STATE OF MICHIGAN

COURT OF APPEALS

ORLEN VANDRIESSCHE,
NANCY JEAN BUMGARNER, and
DONNA ANDERSON,

Plaintiffs-Appellants,

v

VAN KAMPEN AMERICAN CAPITAL GROUP,

Defendant-Appellee.

UNPUBLISHED
February 11, 2000

No. 215589
Calhoun Circuit Court
LC No. 98-001920-CK

Before: Markey, P.J., and Murphy and R.B. Burns*

PER CURIAM.

Plaintiffs appeal as of right from the trial court order granting defendant's motion for dismissal for nonjoinder pursuant to MCR 2.205(B). Plaintiffs' claim against defendant sought to compel partition of a fund account jointly owned by plaintiffs and nonparty Theresa Deems. We affirm.

In 1986, Mildred and Gerald VanDriessche added plaintiffs' and Theresa Deems' names to their own as "joint owners with rights of survivorship" in a fund account administered by defendant. Mr. and Mrs. VanDriessche passed away in 1993 and 1995, respectively, leaving the four persons added in 1986 as sole owners. Plaintiffs requested that defendant partition the account into four separate and equal shares. Defendant refused to do so in the absence of Theresa Deems' consent or a court order. Thus, plaintiffs commenced this action seeking a court order compelling partition.

On June 29, 1998, Theresa Deems was dismissed for lack of personal jurisdiction because of her Virginia residency. Defendant filed a motion to dismiss for nonjoinder, claiming that the absence of a "necessary party" under MCR 2.205(A) warranted dismissal pursuant to MCR 2.205(B). After a brief hearing, the trial court granted defendant's motion for dismissal. This appeal challenges the trial court's granting of defendant's motion.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

First, plaintiffs contend that the trial court's finding, that Theresa Deems was a "necessary party" under MCR 2.205(A), was clearly erroneous. Generally, this Court reviews findings of fact made by a trial court sitting without a jury under a clearly erroneous standard. *Gumma v D & T Construction Co*, 235 Mich App 210, 221; 597 NW2d 207 (1999) (citing *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 636; 583 NW2d 215 (1998)). A finding is clearly erroneous when this Court, reviewing the entire record, is left with the "definite and firm conviction that a mistake has been committed," even if there is some evidence supporting the finding. *Gumma, supra*, 221.

MCR 2.205(A) states that joinder of a person is "necessary" where the person has such an interest in the subject matter that "their presence in the action is essential to permit the court to render complete relief."

Theresa Deems is one of four joint owners of the fund administered by defendant. Defendant contends that it would remain exposed to future litigation by Deems if plaintiffs received a favorable judgment that was not binding on her. We agree. The trial court could not afford complete relief to defendant in Deems' absence. We find that, because a potential judgment would not be binding upon Theresa Deems, her "presence in the action was essential to permit the court to render complete relief."

Plaintiffs' reliance on *Troutman v Ollis*, 134 Mich App 332; 351 NW2d 301 (1984), is misplaced. In *Troutman*, the Court noted that complete relief could be granted to the plaintiffs where an absent party had a separate and distinct claim for damages and proofs that were individual to him. *Id*. at 339-340. Although *Troutman* involved the application of the court rule that preceded MCR 2.205, the "complete relief" standard was also part of that inquiry. *Id.* at 336, 340.

We find this case distinguishable from *Toutman*, which involved multiple, severable claims against a common defendant. Here, the parties concede that each plaintiff and Theresa Deems have the exact same rights and claims to the fund account. Plaintiffs and Deems are joint tenants with rights of survivorship in the account. However, Theresa Deems' refusal to voluntarily participate in any partition of the account or waive personal jurisdiction makes the relief sought by plaintiffs and Deems adversarial. There cannot be a complete adjudication of the rights and interests in Deems' absence. *Id.* at 337. Accordingly, we conclude that the trial court's finding, that Theresa Deems was a "necessary party," was not clearly erroneous.

Next, plaintiffs contend that the trial court clearly erred when it did not conclude that a "failure of justice" would result from the dismissal of plaintiffs' claim. MCR 2.205(B) states that if jurisdiction over a "necessary party can be acquired only by their consent or voluntary appearance, the court *may* proceed with the action and grant appropriate relief to persons who are parties to prevent a *failure of justice*." (Emphasis added.)

Generally, the word "may" is used to designate a discretionary provision, while "shall" designates a mandatory provision. *AFSCME v Highland Park Bd of Ed*, 214 Mich App 182, 186; 542 NW2d 333 (1995), aff'd 457 Mich 74; 577 NW2d 79 (1998) [citing *Mollett v Taylor*, 197 Mich App 328, 339; 494 NW2d 832 (1992)]. Thus, we will review the trial court's decision, that it would not proceed with the action in the absence of a "necessary party," under an abuse of discretion

standard. An abuse of the trial court's discretion is found where "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Franzel v Kerr Mfg Co*, 234 Mich App 600, 620; 600 NW2d 66 (1999) [citing *Cleary v The Turning Point*, 203 Mich App 208, 210; 512 NW2d 9 (1994)]. An abuse of discretion is also found where the trial court's decision is "so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Gadomski*, 232 Mich App 24, 33; 592 NW2d 75 (1999).

The trial court dismissed this case based on its application of the factors stated in MCR 2.205(B). In making a determination whether to grant relief without a necessary party in order to prevent a "failure of justice," MCR 2.205(B) provides that the trial court "shall consider" the following factors:

> (1) whether a valid judgment may be rendered in favor of the plaintiff in the absence of the person not joined;
>
> (2) whether the plaintiff would have another effective remedy if the action is dismissed because of the nonjoinder;
>
> (3) the prejudice to the defendant or to the person not joined that may result from the nonjoinder; and
>
> (4) whether the prejudice, if any, may be avoided or lessened by a protective order or a provision included in the final judgment. [MCR 2.205(B)(1)-(4).]

The parties do not dispute that both Theresa Deems and defendant are subject to personal jurisdiction in Virginia. However, plaintiffs first contend that, because the facts occurred in Michigan, Michigan courts should litigate the matter. Plaintiffs cite no authority to support this contention or to suggest that Virginia courts could not apply Michigan law. Thus, the issue is abandoned. *Neal v Oakwood Hospital Corp*, 226 Mich App 701, 722; 575 NW2d 68 (1997).

Second, plaintiffs argue that litigation in Virginia would be financially prohibitive and, thus, the court erred in determining that they have "another effective remedy." MCR 2.205(B)(2). However, plaintiffs have failed to demonstrate that the additional expense of litigating this dispute in Virginia equates to a "failure of justice." *Neal, supra*. There is ample support for the trial court's finding that plaintiffs have an effective, albeit "less convenient," alternative remedy. MCR 2.205(B) (2). Additionally, in light of Theresa Deems' unwillingness to partition an account that she owns jointly with plaintiffs, the trial court did not clearly err in finding that prejudice to Theresa Deems would be pronounced if the litigation proceeded in her absence. MCR 2.205(B)(3).

In light of the prejudice to defendant and Deems and the alternative remedy available to plaintiffs, we find that the trial court did not abuse its discretion in applying the MCR 2.205(B) factors. The trial court's application did not result in a "failure of justice" to plaintiffs.

Finally, plaintiffs contend that the trial court erred in not applying a banking analogy to the "failure of justice" issue. Plaintiffs suggest that if the trial court applied either of several allegedly analogous statutes, plaintiffs would have immediate rights of withdrawal and Theresa Deems' absence would no longer be relevant. Specifically, plaintiffs reference: (1) the Securities Registered in Beneficiary Form Act, MCL 451.477; MSA 19.858(7); (2) the Credit Union Beneficiary Accounts Act, MCL 490.81; MSA 23.510(81); and (3) the Joint Ownership Statute, MCL 487.703; MSA 23.303. This issue was neither raised nor addressed in the trial court. Accordingly, it is waived on appeal. *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *Federated Publications, Inc v Board of Trustees of Michigan State University*, 221 Mich App 103, 119; 561 NW2d 433 (1997), rev'd on other grounds 460 Mich 75; 594 NW2d 491 (1999).

We do note, however, that the gravamen of plaintiffs' argument is that these statutes are analogous because they demonstrate a legislative intent to cover the instant matter. Thus, plaintiffs contend that the trial court abused its discretion in not drawing the analogies in its weighing of the "failure of justice" issue. We find that none of the statutes are directly applicable. Accordingly, we conclude that, had this issue been raised and addressed, the trial court would not have abused its discretion in failing to draw analogies to this inapplicable law within its "failure of justice" analysis.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns